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JUN -8 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2009-0110
	DEPARTMENT A
JUSTIN H. FOUNTAIN,	
	MEMORANDUM DECISION
Petitioner/Appellee,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
MARISELLA FOUNTAIN,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. DO20010433

Honorable Robert Duber II, Judge

AFFIRMED

Thompson, Montgomery & DeRose
By Jerry B. DeRose
Globe
Attorneys for Petitioner/Appellee

David Alan Dick and Associates
By David Alan Dick
Chandler
Attorneys for Respondent/Appellant

K E L L Y, Judge.

¶1 Appellant Marisella Garcia (formerly Fountain) appeals from the trial court's order dismissing her motion for modification of the child custody agreement between Marisella and her former spouse, appellee Justin Fountain. Finding no abuse of discretion, we affirm.

Background

¶2 Justin and Marisella were married in 1990. The marriage ended in dissolution in 2001, and the trial court awarded joint legal custody of the couple's two children, both then minors, in accordance with a "Joint Parenting Plan" to which the couple had agreed. The plan provided that Marisella would have physical custody of the children on Mondays and Tuesdays, that Justin would have physical custody on Wednesdays and Thursdays, and that each would have physical custody on Fridays and Saturdays every other week. From Saturday night to Monday morning of each week, the children would stay with the paternal grandparents. The parties also agreed that "the children shall remain in Globe Public Schools" and that, if either party were to "relocate[] outside the Globe-Miami area, a new Parenting Plan shall be negotiated." The children, however, would "remain in the Globe-Miami area and their residence shall not be changed to an area outside the Globe-Miami area." The plan provided that neither party would pay child support.

¶3 In February 2009, after the older of the children had turned eighteen, Marisella moved to "modify custody co-parenting time and support" of the parties' daughter, then age ten. Marisella requested sole custody, "subject to co-parenting time

with Justin . . . every other weekend, alternating federal holidays, and two weeks each summer." In the motion, Marisella maintained that Justin had "failed to exercise his co-parenting . . . time with the children" and had instead left them with their paternal grandmother. She also informed the court she and her boyfriend had purchased a home in Queen Creek, which was closer to her place of employment, and she contended the younger child wanted "to live primarily with [her] in Queen Creek" and would benefit from doing so.[1]

¶4 Justin opposed the motion, alleging Marisella did not work where she had claimed and did not "own[] any interest in a home in Queen Creek." He also denied Marisella's assertions that he was not spending his parenting time with the children and that it would be in the child's interest to move to Queen Creek. At a hearing on temporary orders on June 4, 2009, the trial court found Marisella had "violated the orders of the Court which were adopted as part of the parenting plan" and ordered that the child remain "in the school in the Globe/Miami community."

¶5 Thereafter, in July 2009, the trial court held a bench trial on the custody and relocation issues. After Marisella had presented her case, Justin moved to dismiss the motion to modify, arguing Marisella had not met her burden of proof to support a change of custody and a modification of the parenting plan to allow relocation. The court

[1]Marisella also stated in the motion that the couple's older child was "moving . . . with [her]." Justin disputed that fact.

granted Justin's motion, dismissed Marisella's motion, and entered judgment in favor of Justin. This appeal followed.

Discussion

¶6 First, we address certain procedural irregularities in Marisella's provision of trial and hearing transcripts to this court. As the appellant, Marisella was obligated to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b). In her opening brief, Marisella maintained she "d[id] not have the funds to order a full transcript in this matter" and "intend[ed] to proceed on the limited record of the Judge's statement of elements considered in making his decision and the testimony of the child." Justin, on the other hand, has moved the trial court to impose sanctions on Marisella for failing "to make arrangements with the Court reporter to transcribe the proceedings."

¶7 Following a hearing, which was held after Marisella had filed her opening brief in this court, the trial court ruled that the transcripts of the trial should be prepared at Marisella's expense, leaving Marisella five days to decide if she wished to include the transcripts of any other proceedings as well. The parties also apparently agreed that, "subject to approval of the Court of Appeals[, Justin could] . . . delay [the] filing of his responsive brief until forty (40) days following the filing of the transcript as the Court has ordered it now or as it may subsequently be supplemented through the rules."

¶8 After he had already filed a "Designation of Additional Record" in this court to include the transcript of the June 4 hearing on temporary orders, Justin also moved the trial court to order Marisella to provide the transcript of that hearing. Following another hearing, held after Justin had filed his answering brief on appeal, the trial court stated it had relied on the evidence presented at the June 4 hearing, but it did not order that a transcript be prepared, "leaving to the parties to make that determination."

¶9 Marisella then filed her reply brief with this court and included with it an appendix containing the transcripts of both days of the bench trial. Shortly thereafter, the court reporter filed the transcript of the first day of the bench trial. The transcript of the June 4 hearing has not been provided to this court. We therefore proceed with the record before us, presuming that any transcripts missing from the record support the trial court's factual findings and rulings. *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

¶10 In determining child custody, "[t]he trial court is given broad discretion in determining what will be the most beneficial for the child[], and it is in the best position to determine what is in the child[]'s interest." *Porter v. Porter*, 21 Ariz. App. 300, 302, 518 P.2d 1017, 1019 (1974) (citation omitted). We therefore review the court's custody and parenting-time decisions for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, ¶ 7, 79 P.3d 667, 669 (App. 2003). We will not disturb those determinations unless it clearly appears that the trial court has mistaken or ignored the evidence. *Armer v.*

Armer, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). For us to hold that there has been an abuse of discretion, "'the record must be devoid of competent evidence to support the decision of the trial court.'" *Borg v. Borg*, 3 Ariz. App. 274, 277, 413 P.2d 784, 787 (1966), *quoting Fought v. Fought*, 94 Ariz. 187, 188, 382 P.2d 667, 668 (1963).

¶11 Pursuant to A.R.S. § 25-408(B) and (H), if there is, as here, a written agreement entitling both parents to custody or parenting time, the trial court "shall not deviate from a provision [of the plan or agreement] by which the parents specifically have agreed to allow or prohibit relocation of the child unless the court finds that the provision is no longer in the child's best interests." Furthermore, "[t]here is a rebuttable presumption" that such a provision "is in the child's best interests." § 25-408(H). In determining the child's best interests, the court is to "consider all relevant factors" including the following, specified in A.R.S. § 25-403(A): (1) the parents' wishes; (2) the child's wishes; (3) the child's relationship with his parents, siblings, and other persons "who may significantly affect the child's best interest"; (4) "[t]he child's adjustment to home, school and community"; (5) "[t]he mental and physical health of all individuals involved"; (6) "[w]hich parent is more likely to allow the child frequent and meaningful continuing contact with the other"; (7) the identity of the primary care provider; (8) "[t]he nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody"; and (9) whether a parent has complied with the required domestic relations educational program. Additionally, the court should consider various other factors relating specifically to the proposed relocation. § 25-408(I).

¶12 Marisella complains the trial court here "used the fact that the parties had entered into a joint parenting plan to [apply] a higher standard incorrectly about changing such a plan than . . . the standard set forth in" the above statutes. But, on the record properly before us, we find no abuse of discretion. The court thoroughly considered the specific statutory factors and correctly explained that Marisella was required to overcome a rebuttable presumption in favor of the agreement not to relocate. *See* §§ 25-403(A), 25-408(H), (I). Likewise, we cannot say the record is devoid of evidence to support the trial court's decision. *Borg*, 3 Ariz. App. at 277, 413 P.2d at 787. Much of Marisella's argument on appeal is essentially a request for a different weighing of the evidence—a function inappropriate for appellate review. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). We decline to substitute our own analysis of the statutory factors.

¶13 Marisella also contends the trial court "considered the interaction and demands of the grandparents contrary to [the court's] ruling in *Munari v. Hotham*[, 217 Ariz. 599, 177 P.3d 860 (App. 2008)]." In *Munari*, the mother and stepfather sought relief from the trial court's order holding them in contempt for not making the mother's child available to grandparents for court-ordered visitation. They argued, based on *Sheehan v. Flower*, 217 Ariz. 39, 170 P.3d 288 (App. 2007), that the statute governing parental rights in relocation, § 25-408, does not apply to grandparents. *Munari*, 217 Ariz. 599, ¶ 9, 177 P.3d at 862-63. But as the *Munari* court explained, this court did not decide in *Sheehan* that, when a parent petitions for leave to relocate a child, "the court may no longer consider the child's best interests in ruling on that petition." *Id.* ¶ 14. Marisella's

reliance on *Munari*, therefore, is misplaced. To the extent the trial court considered the grandparents' wishes and their interaction with the child in determining her best interests, as provided by § 25-403(A)(3), it was entitled to do so.

Disposition

¶14 The judgment of the trial court is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge